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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 515

BEMIS BRO. BAG COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT.

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Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

The petition of Bemis Bro. Bag Company respectfully shows to the Court:

Bemis Bro. Bag Company, petitioner herein, filed suit in the District Court of the United States for the Eastern Division of the Eastern District of Missouri, seeking the recovery of income taxes paid for 1918 and 1919. That Court rendered judgment in favor of the defendant, which, upon appeal, was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit.

Certified copy of the entire record in said case in said Circuit Court of Appeals is hereby furnished and made a part of this application, in compliance with rule 35 of this Honorable Court. Your petitioner is advised and believes that the said judgment of the United States Circuit Court of Appeals in this case is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination in conformity with the provisions of Section 240 (a), Judicial Code (Title 28, U. S. C., Sec. 347 [a]).

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner filed its returns of income and invested capital for the years 1918 and 1919 in due time and paid the profits taxes and income taxes shown by such returns respectively at the quarterly due dates in 1919 and 1920. It paid an additional assessment of $98,549.28 for the year 1918 on June 30, 1920, and the balance thereof, $695.70, was paid in 1922 by a credit. It paid on December 16, 1920, an additional assessment for 1919 amounting to $34,630.31 (R. 10-11).

Petitioner overpaid its said taxes for the year 1918 in the amount of $14,054.18, and for the year 1919 in the amount of $9,073.15. The Commissioner of Internal Revenue refused to refund these overpayments because he al-

leged the claims for refund filed within due time were not sufficient (R. 14, 74).

On February 29, 1924, petitioner duly filed a claim for refund of part of the taxes paid for 1918 (R. 11), and on December 12, 1924, it filed a similar claim for refund for 1919 (R. 12). **Both claims were timely.**

The claims for refund filed for both years were identical, so far as the matter in controversy here is concerned (R. 26). They alleged that the excess profits and war profits taxes for 1918 and the excess profits tax for 1919 should be determined in the manner provided in Section 328 of the Revenue Act of 1918 (Act February 24, 1919, C. 18, Sec. 328). In support of said allegation the claims for refund set out certain facts concerning petitioner's invested capital, including all of the facts upon the basis of which the Commissioner of Internal Revenue ultimately found the overpayment and the overassessment, being the same facts upon which recovery was sought in this suit (R. 37-38).

On October 30, 1926, the Commissioner of Internal Revenue advised petitioner by letter that "the claim for 1919 will be rejected in full upon the next schadule" (R. 57), and on November 27, 1926, he advised petitioner that "the claim for 1918 will be rejected in full and the Collector of Internal Revenue will be officially notified" (R. 58). At the time said letters were written, being approximately two years after the claims were filed, the Statute of Limitations barred the filing of a new claim.

On December 13, 1926, petitioner filed an amendment to its original claims, by which it asked for additional invested capital under Section 301 of the Revenue Act of 1918, on account of **the very same facts alleged in its original claims**, but which in its original claims were urged as a basis for its claim to the right to assessment of its excess profits taxes under section 328 (R. 59).

After he received said amendment the Commissioner of Internal Revenue reconsidered his previous ruling, proposing to reject said claims, held a conference with petitioner's representatives and caused its books to be investigated by a revenue agent in St. Louis upon the matters involved in said claims, recalculated the taxes and found the overpayments stated above (R. 12, 13). Under date of December 17, 1927, he sent a letter to petitioner (R. 69), in which he stated the said overpayments, and in which he further stated (R. 78):

> "Inasmuch as computation of your tax liability for 1918 and 1919 under the provisions of Sections 327 and 328 of the Revenue Act of 1918 is denied and your claim for the refunding of $1,270,907.97 for 1918 is confined to that point, **it will be rejected in full in the next schedule to be approved by the Commissioner.**
>
> "Your claim for the computation of your tax liability for 1919 under the provisions of sections 327 and 328 has already been rejected."

The Commissioner of Internal Revenue gave no consideration or effect to said amendment.

This suit was begun in the District Court on January 2, 1929 (R. 2).

All of the facts were stipulated at the trial in the District Court, and it was further stipulated as follows (Stip., Par. XVIII, R. 14):

> "If the plaintiff, within the time provided by law, filed claims for refund for the years 1918 and 1919, respectively, which, under the law, were sufficient to be the required preliminary for the maintenance of this action on that ground, above stated, then plaintiff will be entitled to judgment for the year 1918 in the amount of $14,054.18, with interest, and for the year 1919 in the amount of $9,073.15, with interest.
>
> "If the claims for refund filed by the plaintiff for the years 1918 and 1919, respectively, were not sufficient under the law to be the required preliminary for the maintenance of this action on that ground, then defendant will be entitled to judgment dismissing this action."

If the amendment to the claims for refund filed December 13, 1926, must be considered, then it cannot be doubted and is not questioned that the claims for refund as so amended were sufficient as the required preliminary for the maintenance of this action on the ground alleged in the petition.

The judgment of the United States Circuit Court of Appeals rests upon two conclusions set forth in the Court's opinion, which are as follows:

(a) The Court ruled that the claims for refund were rejected by the Commissioner of Internal Revenue by his letters dated October 30, 1926, and November 27, 1926, and that the amendment filed December 13, 1926, could not be considered, because it was offered after the claims were rejected (R. 96).

(b) The Court ruled that, although the original claims for refund set forth all of the facts which are alleged in the petition filed in the District Court and which are the basis of the action, the claims were not sufficient to sustain the suit because these facts were set forth in the claims in support of a prayer for assessment under said Section 328 of the Revenue Act of 1918, whereas the overpayment was found under Section 301 of said act (R. 98).

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Your petitioner assigns the following reasons why this petition for writ of certiorari should be granted:

(1) Important questions affecting the administration of the National Revenue Acts have been decided in this case erroneously and contrary to the judgment of the other Federal Courts. The questions have never been directly decided by this Court. The nature of the questions is as follows:

(a) The tax was paid more than five years before the

suit was begun, so that, unless the suit was begun within two years after the claims for refund were rejected, it was begun too late (U. S. C. A., Title 26, Sec. 156). The parties stipulated that the suit was begun in time and, therefore, that the claims for refund were not rejected until after January 2, 1927—two years before the suit was begun. The Court, contrary to the stipulation and the Commissioner's statement (quoted above), in his letter dated December 17, 1927, ruled that the claims were rejected, respectively, by his letters of October 30th, 1926, and November 27th, 1926, and, therefore, an amendment filed on December 13th, 1926, could not be considered. The Court ruled that the claims for refund were rejected by said letters, stating a purpose to reject them on the next schedule, irrespective of when they were actually rejected on such schedule.

The Court, in effect, ruled that the notice by the Commissioner of Internal Revenue that he will reject a claim for refund constitutes in itself a final rejection of such claim beyond recall by the Commissioner of Internal Revenue.

(b) The Court ruled that recovery may not be had of an overpayment of taxes, disclosed by and resulting from the facts stated in a claim for refund, if such facts were stated in such claim for refund as the basis for the calculation of an overpayment under the wrong section of the statute.

(2) The rulings of the Court in this case are of national importance, not only because they conflict with the final decisions of the other Federal Appellate Courts and thereby render the uniform application of the National Revenue Laws impossible; but also because, if they are applied by the administrators of the law, they will clog the administration with improper technicalities and will burden the courts with unnecessary litigation.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals, Eighth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 9415, Bemis Bro. Bag Company, appellant, v. United States of America, appellee, and that the said judgment of the United States Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

BEMIS BRO. BAG COMPANY,
By SPENCER M. THOMAS,
STANLEY S. WAITE,
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SUPREME COURT OF THE UNITED STATES.

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No.....

BEMIS BRO. BAG COMPANY,
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UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals, Eighth Circuit, is reported under the title Bemis Bro. Bag Company v. United States, 60 Fed. (2) 944 to 950 and is printed on pages 90 to 100 of the record.

II.

JURISDICTION.

The judgment of the Court of Appeals for review was entered September 1, 1932 (R. 103). The petitioner thereafter filed a petition for rehearing on September 19, 1932 (R. 108), which was denied by order entered on September 30, 1932 (R. 109).

This is a civil suit against the United States for the recovery of an overpayment of income taxes, and the writ of certiorari is sought directed to the United States Circuit Court of Appeals, Eighth Circuit.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (Title 28, U. S. C. A., Sec. 341 [a]). The following cases sustain the jurisdiction of this Court: U. S. v. Felt & Tarrant Mfg. Co., 283 U. S. 269; Tucker v. Alexander, 275 U. S. 228.

III.

STATEMENT OF FACTS.

A full statement of the facts is given in the petition for the writ of certiorari under heading "A. Summary Statement of the Matter Involved." For the sake of brevity it is not repeated here.

IV.

SPECIFICATION OF ERRORS.

The decision of the Court is erroneous and is contrary to the decisions of the other federal courts in the following findings and rulings:

(a) That the Commissioner of Internal Revenue rejected these claims for refund respectively by his letter of October 30th and November 27, 1926, stating that the claims will be rejected, and, therefore, an amendment filed on December 13, 1926, could not be considered.

(b) That recovery may not be had of an overpayment of taxes disclosed by and resulting from the facts stated in a claim for refund because such facts were stated in such claim for refund as the basis for the calculation of an overpayment under the wrong section of the statute.

V.

ARGUMENT.

Summary of the Argument.

The Court, in error, ruled that the letters of the Commissioner of Internal Revenue, dated October 30 and November 27, 1926, stating that petitioner's claims for refund will be rejected, were a rejection of such claim. The Commissioner did not so regard them, and his subsequent con-

duct is inconsistent with a previous rejection. Moreover, the parties in the stipulation of the facts and the issues agreed that the plaintiff should recover if its claims for refund were sufficient, when, if the claims were rejected by and at the date of said letters, the plaintiff would not have been entitled to recover, whether the claims were sufficient or not. The amendment to the claims filed December 13, 1926, was proper and sufficient.

Section 3226, Rev. Stat. (U. S. C., Title 26, Sec. 156);
Treasury Decision 4235;
U. S. v. Michel, 282 U. S. 676;
Savannah Bank & Trust Co. v. U. S., 58 Fed. (2d) 1068;
McKesson & Robbins v. Edwards, 57 Fed. (2d) 147;
Prentiss & Co. v. U. S., 57 Fed. (2d) 676;
Factors & Finance Corp. v. U. S., 56 Fed. (2d) 902;
Memphis Cotton Oil Co. v. U. S., 59 Fed. (2d) 676.

The Court erred in ruling that upon a claim for refund stating the facts, entitling the claimant to additional invested capital, the claimant is not entitled to recover an overpayment resulting from such additional invested capital, because in the claim for refund such facts were stated in support of a prayer for assessment under Section 328 of the Revenue Act of 1918.

Prentiss & Co. v. U. S., 57 Fed. (2d) 676;
Warner v. Walsh, 24 Fed. (2d) 449;
Paul Jones & Co. v. Lucas, 33 Fed. (2d) 907;

Union Trust Company v. McCaughn, 24 Fed. (2d) 459;
Wunderle v. McCaughn, 38 Fed. (2d), l. c. 260;
Dreyfus Dry Goods Company v. Lyons, 24 Fed. (2d) 29;
Prentiss v. U. S., 46 Fed. (2d), l. c. 160;
Tucker v. Alexander, 275 U. S. 228;
U. S. v. Felt & Tarrant Mfg. Co., 283 U. S. 269;
Treasury Regulations 65, Art. 1306.

Point A.

The Court erred in finding and ruling, contrary to the decisions of the other federal courts, that the Commissioner of Internal Revenue rejected these claims for refund, respectively, on October 30 and November 27, 1926, and therefore that an amendment filed on December 13, 1926, could not be considered.

The parties stipulated the dates when the taxes were paid and when the claims for refund were filed, showing they were filed in due time, to wit, within four years after the taxes were paid (Sec. 284, Revenue Act 1926 [Title 26 U. S. C., Sec. 1065]).

Section 3226, Revised Statutes, as amended by the Revenue Act of 1926 (Title 26 U. S. C., Sec. 156), reads as follows:

> "No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed

or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

The suit was begun in the United States District Court on January 2, 1929.

The statute quoted above establishes or fixes two conditions upon a suit material for consideration here: (1) A claim for refund must be filed with the Commissioner, and, as construed by the courts, the suit must be based on the same grounds or causes of refundment as are set out in the claim for refund, and (2) the suit must be begun within two years after the Commissioner has disallowed or rejected the claim.

The parties in this case stipulated that the plaintiff (petitioner) is entitled to recover if in due time it filed a claim for refund sufficient to be the required preliminary for the maintenance of this action. As stated, it is not questioned that the claims were filed in due time.

If the suit begun on January 2, 1929, was not begun within two years after the claims were rejected, then it made no difference whether the claims were originally sufficient or not. The suit, in that event, was brought too late. By this stipulation the parties agreed that the time when the claims for refund were **rejected** was not material —that is, it was, in effect, stipulated that the claims were rejected after January 2, 1927.

The Court ruled as follows (R. 96):

> "The letter of December 13, 1926, from the appellant to the Commissioner (this is the amendment) was written **after the claims filed for 1924 were denied** and after the Statute of Limitations had expired. The only question, **therefore**, presented to this Court is whether or not the claims for refund filed by appellant on February 29, 1924, and December 13, 1924, were sufficient under the law to be the required preliminary for the maintenance of this action, which is based on overpayment of its taxes for 1918 and 1919 on the grounds that its invested capital is a larger amount than was set forth in its returns for those years." (Emphasis ours.)

The Court ruled in the above-quoted statement that the

claims for refund were denied or rejected by the Commissioner of Internal Revenue by his letters dated, respectively, October 30, 1926, and November 27, 1926, in which the Commissioner stated that the claims for refund will be rejected, and for that reason the amendment filed December 13, 1926, should not be considered. If said amendment was filed before the claims were rejected, there is no question of the right of petitioner to recover.

The Court, in its opinion, called attention to the fact that after petitioner's letter of December 13, 1926, was received by the Commissioner of Internal Revenue (after the Court says the claims were denied) he arranged and held a conference with petitioner, requested additional information, which was furnished him in letter dated April 12, 1927, recalculated the tax-giving effect in invested capital to the facts disclosed upon the claims for refund, found the overassessments sued for and refused to refund them for the reasons previously stated. The Court also recites in its opinion that in the letter dated December 17, 1927, the Commissioner also makes the statement "that your claim will be rejected in full in the next schedule to be approved by the Commissioner."

It is apparent that the Commissioner believed that he still had jurisdiction of the claims. Even in his letter of December 17, 1927, he states that the claims are then disallowed only because they were originally not sufficient. The date of the rejection of the claims never entered into the case until the Court injected it in its opinion.

The effect of the Court's ruling is that the Commissioner's letter to the taxpayer notifying him that he will reject a claim is per se a final rejection of the claim, which the Commissioner is powerless to revoke.

The Court uses this finding in a left-handed manner. It does not say the suit was begun more than two years later, and was, therefore, too late. It says only that the amendment to the claim filed thereafter is not to be considered.

The ruling of the Court is contrary to the decisions of the Treasury Department. Its regulations (T. D. 4235) provide as follows:

> "Any claim which has been disallowed will be reconsidered and allowed at any time prior to the expiration of the Statute of Limitations for bringing suit if it clearly appears that the claim should be allowed on the merits. No reopening or application for reopening will extend the period within which suit must be brought. Nor will the reconsideration of the claim be considered as a reopening."

This treasury decision in the first subdivision provides even that the claim may be reopened under the circumstances stated therein after the time for bringing suit has expired.

The decision in this respect is contrary to the implications in the case of United States v. Michel, 282 U. S. 656, wherein the Court says:

> "The Commissioner of Internal Revenue, by letter dated August 17, 1925, advised Michel that his claim would be rejected, and that the rejection would appear on the next schedule to be approved by him. The claim was rejected on September 2nd. The Commissioner, on April 2, 1925, sent a like letter to Krieger and his claim was rejected April 20th."

This Court in the above-mentioned case did not hold that the Commissioner's letter was in itself a full and final rejection of the claim.

The ruling of the Court of Appeals is also contrary to the following decisions:

Savannah Bank & Trust Company v. U. S. (Ct. Cls.), 58 Fed. (2d) 1068: In this case the Court of Claims held that a claim for refund was not rejected by a letter from the Commissioner, almost identical with those involved in this case, but that it was rejected when it was placed on the schedule of rejections.

The ruling of the Court is directly contrary to the decisions of the United States Circuit Court of Appeals, Second Circuit, in the following cases:

> McKesson & Robbins v. Edwards, 57 Fed. (2) 147; Prentiss & Co. v. U. S., 57 Fed. (2) 676.

These cases are so identical on the facts with the present case, and the entire opinions are so apt, that a quotation

from neither of them presents the complete conflict with the present case and we are fearful that to copy the entire opinions would unduly extend this memorandum. We ask the Court particularly to examine these two cases.

In the case of Factors & Finance Corporation v. United States, 56 Fed. (2d) 902, the Court of Claims of the United States held that an original claim for refund could be amended after the Statute of Limitations barred the filing of a new claim when the original claim was a mere blanket claim.

To the same effect Memphis Cotton Oil Co. v. United States, 59 Fed. (2d) 276.

The ruling of the Court in this case is, without doubt, contrary to the rulings in all other Federal Courts which have passed upon the question.

The effect of the Court's ruling in this case is that the Commissioner's letter notifying a taxpayer that he (the Commissioner) will reject a claim for refund is, in itself and alone, a final rejection of such claim (without any actual rejection), which the Commissioner is powerless to revoke in the event the Statute of Limitations then bars the filing of a claim. In such cases his letter is itself his rejection of the claims, although in his ordinary procedure he does not regard the claim as rejected until it is scheduled for rejection. He may not thereafter consider evidence or argument which may change his conclusions upon

the facts or grounds presented to him by the claim. He may not reconsider his ruling at all. Suit must be filed and must go to judgment in order to set aside and change the ruling, even though the Commissioner admits it to be wrong.

Point B.

The Court erred in finding and ruling that recovery may not be had of an overpayment of taxes, disclosed by and resulting from the facts stated in a claim for refund, because such facts were stated in such claim for refund as the bases for the calculation of an overpayment under the wrong section of the statute.

Section 301 of the Revenue Act of 1918 (Act Feb. 24, 1919) imposed an excess profits tax and war profits tax equal to certain percentages of the income, increasing as the income exceeded named percentages of the invested capital. Invested capital was defined by Section 326 of the act. Section 327 provided (among other conditions) that where the Commissioner is unable to determine invested capital under Section 326, the excess profits and war profits tax should be calculated in the manner provided in Section 328, roughly by comparison to the tax upon the income of representative corporations in the same line of business. Copies of said sections of the Revenue Act are printed in appendix hereto.

The claims for refund in this case set out the facts con-

cerning the two items of invested capital which had been omitted from the taxpayer's original returns and which the Commissioner added to its invested capital, resulting in his finding of an overpayment of the tax calculated under Section 301. These are the same facts set out in the petition in this case. The claims set out these facts to disclose that the invested capital as previously calculated was insufficient and that with the other facts set out invested capital could not be determined. Because the facts were set out in the claims for refund in this manner, the Court ruled that recovery could not be had in this suit.

This ruling is contrary to the ruling of all other Federal Courts.

The Commissioner's regulations required only that a taxpayer in a claim for refund set out the facts (Art. 1306, Regulations 65).

In Prentiss & Co. v. United States, 57 Fed., l. c. 678, the Court said:

> "The defendant does not dispute the undervaluation of the real estate. The claim filed for refund of taxes paid for the calendar year 1918 is disputed because of its insufficiency and inadequacy to support this claim for additional invested capital by reason of such undervaluation. The plaintiff, in its claim for refund, asked for its allowance, stating that 'it is entitled to relief under Sections 327, 328 of the 1918 Act.' The relief to be granted under these sections concededly

is not similar to that which is now sought in this suit. Section 1113 of the Revenue Act of 1926 (44 Stat. 116, now Section 3226 of the Revised Statutes, as amended [26 U. S. C. A., Par. 156]) requires that the claim which is presented must be stated in the application to the Commissioner, and the taxpayer cannot base a recovery in the court upon an entirely different and distinct ground from that presented to the Commissioner (United States v. Felt & Tarrant Mfg. Co., 283 U. S. 269, 51 S. Ct. 376, 75 L. Ed. 1025; Lewis A. Crossett Co. v. United States, 50 Fed. [2d] 292 [Ct. Cl.]). The claim for refund made no reference to undervaluation of real estate, and no reference was made to it until after the claim was rejected by letter of July 16, 1925. However, the Commissioner's action did not appear on the rejection schedule until September 3, 1926. On April 12, 1926, the plaintiff filed an additional brief which is, in effect, an amended claim. Its first brief had been filed before rejection. There was a reconsideration by the Commissioner of the claim after rejection, and it was then urged that there had been an undervaluation of real estate which should have been taken into consideration in determining invested capital. This was sufficient upon which to base a claim under Section 326 as to the allowance for real estate increases. This claim was reconsidered and disallowed. It was sufficient to advise the Commissioner while the claim was under consideration of the reasons the plaintiff put forth then and now for its allowance."

The claim for refund as originally filed in that case was based on section 328, as in this case, and the case was less

meritorious than this case because **the claim did not set out the items of invested capital, as was done in this case.**

In the following cases claims for refund which set out the facts, either with an improper claim for relief or with no claim for relief, were held sufficient:

Warner v. Walsh, 24 Fed. (2d) 449;
Paul Jones & Co. v. Lucas, 33 Fed. (2d) 907;
Union Trust Company v. McCaughn, 24 Fed. (2d) 459;
Wunderle v. McCaughn, 38 Fed. (2d), l. c. 260;
Dreyfus Dry Goods Company v. Lyons, 24 Fed. (2d) 29;
Prentiss v. U. S., 46 Fed. (2d), l. c. 160.

In the cases of Tucker v. Alexander, 275 U. S. 228, and U. S. v. Felt & Tarrant Mfg. Co., 283 U. S. 269, the Court states that the claims did not set out any facts, from which it may be implied that the judgment would have been otherwise if the facts had been stated in the claims.

The Court of Appeals, in its opinion in this case (R. 99), says that the question involved here was decided in the case of Mutual Life Insurance Company of New York v. U. S., 49 F. (2d) 662. The reliance upon that case indicates that the Court misconceived the question involved in this case. In that case it was held that a claim relying upon the statute (by an insurance company for an additional amount, on account of the statutory right to a deduction of 4 per cent on the mean of the reserve) was not

a sufficient claim upon which to found a suit based upon the unconstitutionality of the statute determined in National Life Insurance Company v. United States, 277 U. S. 508, decided long after the claim for refund had been rejected. Of course, in that case the facts, upon which the suit was brought, did not appear in the claim for refund. A claim for an additional deduction **under the statute** can in no sense be regarded as a claim **against the constitutionality of the statutory levy.** The unconstitutionality of the statute is a fact which, under all the rulings of all courts, must be set out at the very beginning of any proceeding which intends to rely on such fact.

If the ruling of the Court of Appeals in this case is sustained, then a taxpayer will be unable to present a claim for refund. The statute becomes, in the words of this Court in the case of Tucker v. Alexander, supra, a mere trap for the unwary. Claims for refund must not only set out the facts with meticulous care, but they must also set out and claim with meticulous care the particular relief, under the statute, resulting from such facts. It is not sufficient that the Commissioner of Internal Revenue knows and understands how the facts should be applied and that he calculate the tax under a proper application of the facts. He may not make the refund, if the claim states the facts under an improper claim of right. If this is necessary, then taxpayers will be put to burdens of expense in the employment of experts in tax matters, which will make it exceedingly burdensome to secure their rights,

even from the United States Government—destructive of confidence in and candor with the tax administrators.

CONCLUSION.

It is therefore respectfully submitted that this case is one clearly for the exercise by this Court of its supervisory powers in order that the administration of the Internal Revenue Laws throughout the United States may be made uniform, and also that taxpayers may deal with the Government of the United States with confidence and decency; and that to such end a writ of certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals, Eighth Circuit, and finally reverse it.

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APPENDIX.

(Act February 24, 1919, C. 18.)

Revenue Act of 1918.

Section 301.

(a) That, in lieu of the tax imposed by Title II of the Revenue Act of 1917, but in addition to the other taxes imposed by this Act, there shall be levied, collected and paid for the taxable year 1918 upon the net income of every corporation a tax equal to the sum of the following:

First Bracket.

30 per centum of the amount of the net income in excess of the excess-profits credit (determined under section 312) and not in excess of 20 per centum of the invested capital.

Second Bracket.

65 per centum of the amount of the net income in excess of 20 per centum of the invested capital.

Third Bracket.

The sum, if any, by which 80 per centum of the amount of the net income in excess of the war-profits credit (determined under section 311) exceeds the amount of the tax computed under the first and second brackets.

(b) For the taxable year 1919 and each taxable year thereafter there shall be levied, collected and paid upon

the net income of every corporation (except corporations taxable under subdivision [c] of this section) a tax equal to the sum of the following:

First Bracket.

20 per centum of the amount of the net income in excess of the excess-profits credit (determined under section 312) and not in excess of 20 per centum of the invested capital.

Second Bracket.

40 per centum of the amount of the net income in excess of 20 per centum of the invested capital.

Section 327.

That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326.

(b) In the case of a foreign corporation. (See Par. 830 and Par. 852.)

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively.

(d) Where, upon application by the corporation, the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of title II) consists of gains, profits, commissions, or other income derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

Section 328.

(a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the

case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profit per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 515.

BEMIS BRO. BAG COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

SUPPLEMENTAL BRIEF FOR PETITIONER.

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Under the decisions of this Court in United States v. Factors & Finance Company (No. 141), United States v. Memphis Cotton Oil Company (No. 308) and United States v. Henry Prentiss & Company (No. 234), January 9th, Last, the Judgment of the Circuit Court of Appeals in This Case Should Be Reversed.

I.

The Amendment Offered Was a Proper Amendment.

Section 327 of the Revenue Act of 1918 reads, in part:

> "That in the following cases the tax shall be determined as provided in section 328:
>
> "(a) Where the Commissioner is unable to determine the invested capital as provided in section 326.
>
> "(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation exceptional hardship, etc."

The claims for refund in this case rested upon paragraph (a), quoted above—that is, it was alleged that the Commissioner was *unable to determine the invested capital* (R. 34 to 41, incl.), and in support of that statement *the special items of invested capital, omitted in the audit of the taxpayer's return and claimed as such in the amendment, were set out in detail* (R. 37 and 38). The memorandum filed on the claim for 1917 under Section 210, Rev. Act 1917, was attached to and made a part of the claims for 1918 and 1919 (R. 31).

In the Prentiss case the original claim for refund rested upon subdivision (d) and no facts were alleged. This difference distinguishes the propriety of the amendment of-

fered in that case from this case and this difference is the source of the different rulings in the Factors & Finance Company case and the Prentiss case.

In the Prentiss case this Court said:

> "The act of the Commissioner of Internal Revenue in granting or refusing special assessment under Section 327 (d) of the Act of 1918 is discretionary and administrative, not subject to be challenged in any court, at least in the absence of fraud and other irregularities. * * * If this amendment is permissible, a request for the exercise of a discretionary jurisdiction will have been turned after the running of the statute * * * into a claim of error of law or fact and hence into a controversy within the jurisdiction of a court. What at the beginning was nonjusticiable with exceptions few and narrow (Williamsport Company v. U. S., supra) will have become justiciable at the end.
>
> "An amendment so far-reaching, a metamorphosis so complete, may well be thought to destroy the identity of the claim or cause of action if the analogies of pleading in a lawsuit are to govern our decision. * * * A cause of action alleging as a grievance that there has been a deviation from a rule of law or the breach of a legal duty in the collection of a tax is far apart from an appeal to an administrative officer to abandon the normal rule or method and substitute another, the substitution being dependent upon administrative discretion. * * * A demand for special assessment in accordance with Section 327 (d) of the Statute of 1918 is not a challenge to any act of the Commissioner in the valuation of invested capital.

On the contrary, the valuation of invested capital is irrelevant if the special method is accepted. * * * Let the new method be adopted and the value of the invested capital ceases to be a factor in the process. * * * The fact remains, however, that the grievance does not grow out of the failure of assessors to value invested capital truly according to the statute. * * *

"A claim or cause of action will be ill-defined for the purpose of an administrative remedy if the definition gives no heed to the understanding or conduct of administrative officers. * * * The presentation of such a claim, unlike the presentation of a claim of error in fact or law, does not suggest the need for a new and general audit of assets and liabilities. The two proceedings, alike in form and consequences, are essentially diverse. By the very terms of the statute (Section 327 [d]), special assessment is the outcome of a special application; it is made on motion of the taxpayer. A revision for error of fact or law, on the other hand, may be made by the Commissioner on his own motion, and indeed is commonly made, for it is incidental to his general duty to audit the accounts.

"The conclusion derived from the analogies of pleadings in a lawsuit is thus seen to be confirmed by the probabilities, if not the certainties, of administrative practice. If this is not enough, however, there is confirmation from other sources. In the pages of this record we find convincing evidence that the understanding of the parties was that the claim for a special assessment was to exclude any claim for the revision of the value of the capital, and that no such claim would be pressed, at all events while the claim for a new method of assessment was alive and undeter-

mined. We have seen that in May, 1924, the Commissioner of Internal Revenue gave notice to the taxpayer that there could be no consideration of the prayer for relief under sections 327 and 328 of the applicable statute 'until statutory net income and invested capital are definitely determined.' * * * In these circumstances its conduct in proceeding with its application for a special assessment was a tacit assent to the condition imposed by the Commissioner and an abandonment of any objection that capital and income had been erroneously valued if valuation was to be ascertained according to the normal method. * * * At least its assent is equivalent to an agreement that the claim for a special assessment shall be deemed to be a distinct one from that for a revision of the value."

Every basis of the ruling in the Prentiss case is lacking in this case. *The opposite of every statement quoted above is true in this case and the ruling in this case should be the converse of the ruling in the Prentiss case.*

In this case the claim asserted that the invested capital as theretofore allowed under the normal method had not been properly determined. There was not only no assent to the invested capital, as determined, but a direct challenge of the allowance of invested capital by the normal method.

The claim in this case was not an appeal to the discretion of the Commissioner. The statute is mandatory as to the manner of assessment where invested capital cannot be determined (Davis v. Andrews, 2 B. T. A. 328). Under

paragraph (d) of section 327 assessment under section 328 can be granted only on application of the corporation, but under paragraph (a) the Commissioner computes the tax under section 328 without any application (Art. 901, Regulations 45 and Regulations 62).

The claim did not set aside invested capital as an immaterial factor. Under the claim it became necessary that the Commissioner determine invested capital if he could. If the Commissioner could determine the invested capital he would not grant special assessment. If he could not determine invested capital he was compelled to grant special assessment. *The determination of invested capital,* if that could be done, *was the first requirement of the audit of this claim.*

Furthermore, the claim set out in detail the very items of invested capital (that is, the very items of tangible and intangible assets, and how they were acquired, and the manner in which they were paid for), which were claimed as invested capital in the amendment to the claim and which are the bases of the cause of action in this suit. The audit of the claim compelled the Commissioner to determine the invested capital to be allowed for these items. The assessment asked for could be granted only if he found that he could not do so.

By the claim in this case, that the Commissioner could not determine invested capital, it was asserted that invested capital, as theretofore calculated, had omitted certain items of invested capital, which should be included

under the normal method of calculation of invested capital, and it is quite apparent that it not only did not renounce a claim to such additional invested capital, but by its very terms asserted the right to and demanded such additional invested capital.

Upon the logic of the Court in the Prentiss case judgment of the Court of Appeals in this case should be reversed.

The distinction contended for above is distinctly set out in the decision in the case of United States v. Factors & Finance Company. In that case the taxpayer filed a claim for refund for 1917 without any specification of error and after the Statute of Limitations barred the filing of a new claim filed a claim for special assessment. The Court said:

> "This is not a case where the grounds injected by the amendment have already been abandoned by agreement, tacit or express. Such abandonment and agreement there was in the Prentiss case, the claimant seeking at the beginning the privilege of the special method of assessment and reverting thereafter to another ground of challenge which by implication, if not expressly, it had promised to renounce. * * *
>
> "There are other elements of difference, however, besides the presence or absence of agreement that divide the Prentiss case from this one. *These other elements of difference are even more important*, for the Prentiss ruling would have been the same if agreement had been absent. When the two cases are considered in the light of administrative practice a distinction is to be noted at the outset between the na-

ture of a special assessment under the Revenue Act of 1918 [section 327 (d)] and the nature of such an assessment under the Act of 1917 (section 210). The application in the Prentiss case was made under section 327 (d) of the Act of 1918, whereby the taxpayer, ignoring a possible challenge of the computation of invested capital, plants itself upon the ground of a variance between the statutory definition and the economic concept, and calls upon the Commissioner to exercise a dispensing power given to him, in circumstances of hardship, by the provisions of the statute. In an application for special relief under section 210 of the Act of 1917, the grounds of challenge are very different if the letter of the section is the measure of relief thereunder. *The value of the invested capital under the statutory definition (Revenue Act of 1917, section 207) is not put aside in such circumstances as an irrelevant inquiry. On the contrary, it becomes the very essence of the claim by the taxpayer that there must be a recourse to another method.* Under section 210 of the Act of 1917, the special method is not permissible unless 'the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital.' *In brief, section 210 of the Act of 1917 is the precursor of section 327 (a) of the Act of 1918*, and is not at all the analogue of section 327 (d). (Cf. Williamsport Co. v. United States, 277 U. S. 551, 558)." (Italics supplied.)

It is plain that, where special assessment is sought under paragraph (a) of section 327, inquiry as to invested capital is not put aside, *but the duty to determine* invested

capital remains (if it can be done), and where the Commissioner finds that he can determine invested capital upon such a claim, which points out the items of omitted invested capital, he should make the refund which results therefrom.

An amendment, claiming additional invested capital, is an improper amendment of a claim under subdivision (d) of section 327 (Henry Prentiss & Company case), but is directly in line and a proper amendment of a claim under subdivision (a) of section 327 (this case).

The original claim in this case was sufficient without amendment. A claim that the Commissioner is unable to determine the invested capital, because he has omitted certain items of invested capital, which are set out in the claim, is itself a claim to such additional invested capital. That is the meaning of the decision in the Prentiss case as explained in the Factors and Finance decision.

The Court says (Factors and Finance case) that under such a claim "the value of the invested capital under the statutory definition * * * is not put aside in such circumstances as irrelevant; on the contrary, it becomes the very essence of the claim by the taxpayer that there must be a recourse to another method." Under this claim it was the duty of the Commissioner to audit the invested capital in order to determine whether or not he could determine invested capital, and the duty to make the refund, found by the required audit, necessarily follows.

The amendment in no manner changed the original

claim—it asserted only a right which existed under the claim itself. It was so asserted in the amendment (Ex. E, R. 58). Such an amendment is merely formal and in no manner changed the cause of action. At most, it changed the prayer for relief upon the cause of action stated in the original claim. The amendment was in no sense a departure from the original claim, but was a proper amendment which became part of, and related back to, the original claim.

II.

The Amendment Was Timely.

As is pointed out above, the amendment was unnecessary, because the original claim was sufficient. But we present now that the amendment was filed while the original claim was "*in fieri.*"

The Court of Appeals in this case ruled that, because the amendment was offered after the Commissioner notified the taxpayer of his purpose to reject the claim on the next schedule, it came too late.

In United States v. Memphis Cotton Oil Company, supra, it is said:

> "* * * He may disallow the claim promptly for a departure from the rule. If, however, he holds it without action until the form has been corrected, *and still more clearly if he hears it, and hears it on the*

merits, what is before him is not a double claim, but a claim single and indivisible, the new indissolubly welded into the structure of the old.

* * * * * * *

"One other question, less general in its significance, is yet to be considered. An argument is made that at the time of this amendment the claim had been finally rejected and the proceeding thereby ended. If so, it was too late (McKesson & Robbins v. Edwards, supra; Solomon v. United States, 57 F. [2d] 150). When correction is thus postponed, there is no longer anything to amend, any more than a lawsuit after the complaint has been dismissed We think the matter is still in fieri. True, the Deputy Commissioner had given notice to the taxpayer that the claims would be rejected and that the rejection would be officially announced in a schedule to be approved thereafter. *No reason is apparent why at any time before such approval the Commissioner or his Deputy was not at liberty to recall the first announcement, and dispose of the case otherwise* (Michel v. United States, 37 F. [2d] 38, reversed, but on other grounds, 282 U. S. 656). We are not now considering what the practice ought to be if there were need to open the proceedings for the submission of other evidence extrinsic to the claims themselves. Neither in the record nor in the argument do we find a suggestion of that need. Long before the amendment the Commissioner had ascertained the facts and had even notified the taxpayer of the justice of his claims and of the ruling of the Bureau that adjustments would be made accordingly. *The dismissal of the claims, when finally*

announced, was for defects of form only. The defects had been corrected and the dismissal may not stand." (Italics supplied.)

This statement directly destroys the basis of the decision of the Court of Appeals in the present case.

In the present case (as in the case of Memphis Cotton Oil Co.) the facts were before the Commissioner long before the amendment. In this case they were set out in the original claim for refund and (similarly to the Factors and Finance case and the case of McKesson & Robbins v. Edwards, 57 Fed. [2d] 147), after the notification by the Commissioner of an intention to deny the claims for refund on the next schedule, as shown by the stipulation of facts (R. 10), he accepted the amendment, audited the amended claims, arranged and held conferences with the taxpayer, caused the Revenue Agent to investigate the claims, allowed the additional invested capital and calculated the refund (refusing to make it only because of defects of form, and without any assertion that the original claims had been denied prior to the filing of the amendments), and stated even then (more than a year after the amendment was filed), that the claims would *then* be denied upon the next schedule. It will be noticed also from the stipulation of facts that the parties agreed that the plaintiff was entitled to recover if the claims for refund were sufficient, which would not have been true if the claims were denied before the amendment was offered, be-

cause then the suit would have been filed more than two years after the claims were denied. It is apparent that the amendments were offered before the claims were denied in this case.

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